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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 1030

GREAT EASTERN COLOR LITHOGRAPHIC CORP.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

GREAT EASTERN COLOR LITHOGRAPHIC CORP.,

Petitioner.

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on December 3, 1962, enforcing a Decision and Order of the National Labor Relations Board, dated October 11, 1961. The petitioner's time for petitioning for the said Writ was extended to April 25, 1963, by the Hon. Arthur J. Goldberg, on the 1st day of February, 1963.

Citations to Opinion and Judgment Below

The Intermediate Report and Recommended Order of the Trial Examiner is printed on page 11 of the Joint Appendix, nine copies of which are being filed herewith, and is reported at 133 N.L.R.B. 945. The Decision and Order of the National Labor Relations Board is printed on page 3 of the Joint Appendix, and is reported at 133 N.L.R.B. 911. The opinion of the United States Court of Appeals (R. 277-283) is printed in Appendix B hereto, *infra*, page 13, and is reported at 309 F. 2d 352. The decree of the United States Court of Appeals (R. 300-301) is printed in Appendix B hereto, *infra*, page 19. The

order of the Court of Appeals denying petitioner's petition for rehearing (R. 294, 295) is printed in Appendix B hereto, *infra*, p. 20. The order of the United States Supreme Court, signed by the Hon. Arthur J. Goldberg, extending petitioner's time to file this Writ, is printed in Appendix B hereto, *infra*, page 21.

Jurisdiction

The decree herein was entered on December 3, 1963. The petitioner's time to file this Writ was extended on February 1, 1963 to April 25, 1963. The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

The Questions Presented

A—Is the Order in question directing reinstatement supported by substantial evidence (Sec. 10(e) of the Labor-Management Relations Act, as amended)?

B—Is a holding of the Court of Appeals that it "cannot say that the Board's findings are not supported by substantial evidence" sufficient to justify enforcing the Board's Order (Sec. 10(e) of the Labor-Management Relations Act, as amended)?

Statutes Involved

The decree below involved the application of Sections 8(a)(1) and 8(a)(3) of the Labor-Management Relations Act, 61 Stat. 140, 29 U.S.C. 158, as amended by 73 Stat. 525, 542, 545 (1959); and Section 10(e) of the Labor-Management Relations Act, 61 Stat. 146, 29 U.S.C. 160, as amended by 73 Stat. 544 (1959).

All the foregoing statutes are printed in Appendix A, hereto.

Statement

This case arose out of a complaint and notice of hearing dated November 1, 1960 issued by the National Labor Relations Board. It was the Board's charge that the petitioner, Great Eastern Color Lithographic Corp., had been guilty of certain unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, and that it had discharged nine employees in violation of the provisions of Section 8(a)(3) of the National Labor Relations Act (J.A. 225).

The Trial Examiner held petitioner guilty in violation of Section 8(a)(1) and guilty of violating Section 8(a)(3) in connection with the discharge of four of the nine employees. The Examiner recommended that the charges with respect to the others be dismissed (J.A. 11). Both the petitioner and the Union appealed to the National Labor Relations Board.

On October 11, 1961, the Board issued its decision and order. In effect, the Board adopted the Trial Examiner's findings with respect to the alleged violations of Section 8(a)(1) of the Act, sustained his findings with respect to three of the employees, but dismissed the charges with respect to one of the employees (J.A. 3).

The Board moved in the Court of Appeals for enforcement of its order. The Court of Appeals granted enforcement, stating "We have discussed these charges at greater length than we ordinarily would, because to our minds the evidence supporting the Board's findings is very close to the borderline of the substantial evidence test" (R. 283; *infra*, p. 18).

Having made this statement, the Court stated its reason for granting enforcement in the following language: " . . . on the basis of that record we cannot say that the Board's findings are not supported by substantial evidence" (R. 283; *infra*, p. 18).

A petition for rehearing *in banc* was filed with the Court on the specific grounds that there was no substantial evidence which would justify enforcement, and on the further ground that the standard set up by the Court as a basis for enforcement was flatly contradictory to the statute. The Court denied the petition for rehearing (R. 294). Mr. Justice Goldberg, by order dated February 1, 1963, extended petitioner's time to April 25, 1963 to apply for a writ of certiorari.

I

Reasons for Granting the Writ

A—With reference to the question as to whether the order to the extent it directed reinstatement is supported by substantial evidence.

The petitioner recognizes, of course, that this Court is most reluctant to review questions of fact in connection with this type of case. However, this Court has laid down the principle that it will intervene "when the standard (i.e., the substantial evidence standard) appears to have been misapprehended or grossly misapplied" (*Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 491).

While paying lip service to this Court's requirement that it review the whole record, the Court of Appeals in the instant case ignored the "contradictory evidence or evidence from which conflicting inferences could be drawn" that the discharges in question were not violations of the Act, and made its decision "merely on the basis of evidence which it felt was sufficient".

There are three discharges which the Board found violated Section 8(a)(3) of the Act and wherein the Court granted enforcement. They are (a) Case, (b) Cross, and (c) Pellizzari.

(a) *Case*

Case, a young man, was discharged the morning after a violent argument in which he cursed out the President of the company, a man old enough to be his father, in front of other employees (J.A. 73). The argument in question did not concern Union matters, and dealt only with the fact that the President of the corporation had reprimanded Case for using profanity in front of women.

Both the Trial Examiner and the Board have found that there was ample cause for Case's discharge. The Examiner, the Board and the Court of Appeals held that this discharge was made in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, solely on the basis of Case's testimony that at the time of his discharge the President of the corporation said to him, "The next time I meet you, kid, you better be a strong arm, * * * you were a strong arm last night, and you were a strong arm when you handed out those papers."

The Court of Appeals, in its opinion, however, overlooked completely the fact that on cross examination Case admitted that the significant language, i.e., "You were a strong arm when you handed out those papers", was not used at the time of his discharge (J.A. 75). In addition, the Court of Appeals disregarded completely the fact that Case himself, several weeks after the discharge, when he had no reason for misstating the facts, stated to an employee that the reason for the discharge was the fact that he had bawled out the President of the company (J.A. 79). If these two admitted facts are considered, Case's testimony as to the alleged statement of the President at the time of the discharge becomes so discredited as to lose any possibility that it can be regarded as "substantial evidence" of a discharge in violation of Section 8(a)(3).

(b) *Cross*

Cross was discharged on September 13, 1960. Again, all parties concede that there was ample cause for Cross'

discharge. The Court of Appeals, however, indicated that the discharge was a violation of Section 8(a)(3) on what it refers to, as the "uncontradicted testimony of Cross" that the President of the corporation, shortly before the discharge, pointed to him and said, "There is the guy that called me up begging for a job and I hired him and he's joined the Union, * * * That's all right, he can get a job some place else."

In holding that the testimony was "uncontradicted", the Court of Appeals made no reference to the three separate affidavits which Cross gave to the National Labor Relations Board prior to the hearing with reference to all of the circumstances surrounding his discharge. The last affidavit was taken by the attorney who tried the case on behalf of the Board. Nowhere in any of the three affidavits did there appear any reference to the alleged statement of the President on which the Court of Appeals has relied for its finding (J. A. 32, 131). It is inconceivable that the Board's agents and certainly the Board's attorney on three separate occasions failed to inquire as to statements made by the employer at or shortly before the discharge or that Cross would fail to volunteer that such a statement was made. Nevertheless, nowhere did Cross, in any of his affidavits, state that the President ever made such a remark. It would be hard to find a stronger contradiction of the testimony given by a witness.

In addition to this contradiction, the Court of Appeals makes no reference to the fact that on the argument before the Court of Appeals the Board attorney conceded that it was the position of the Board that the respondent knew of Cross' Union membership prior to September 10. Nevertheless, the undisputed testimony shows that Cross was asked to come in on that day, did not come in until he was called by the company and asked to come in, and then left early Saturday afternoon, in complete disregard of direct orders, so he could attend a motorcycle race. If the company was looking for an excuse to discharge Cross, it is conceded by all that this was the time when the com-

pany could have discharged him without fear of any reprisal. Nevertheless, the company kept him on, kept him working the following Monday, and did not discharge him until he showed up Tuesday hung-over. The uncontradicted testimony is that Cross was suffering from a hang-over when he reported for work Tuesday morning, and that he was discharged at the end of the work day.

If the fact is considered that we have only Cross' unsupported statement, which is contradicted by his prior statements and by the action of the company, it is difficult to see how this unsupported statement can constitute substantial evidence within the meaning of the Act.

(c) *Pellizzari*

It was the company's position that Pillizzari was discharged for smoking after the insurance company had cracked down on smokers. It is the position of the Court of Appeals, apparently, that Pellizzari was a good worker, that his previous smoking habits had been condoned, and that the discharge was solely for Union reasons. The Court of Appeals makes no reference to the fact that Pellizzari has stated flatly that if he were not discharged he would have continued smoking on the job regardless of any orders given (J. A. 160).

By its direction that this man be reinstated, the Court of Appeals has immunized this man from being discharged for smoking. In a word, regardless, apparently, of any instructions that the employer may give to Pellizzari, Pellizzari may continue to smoke in the presence of inflammable materials with complete impunity against discharge.

As has been noted above, the Court of Appeals, without referring to the admitted facts set forth above, conceded "the evidence supporting the Board's findings is very close to the borderline of the substantial evidence test." If, as a matter of fact, the Court itself had actually taken into consideration the evidence referred to above, there is scarcely a scintilla of evidence remaining to support the Board's order.

As a matter of fact, in its decision in this case, the Court of Appeals for the Second Circuit has gone much further than that same Court went in *N.L.R.B.* v. *Columbia Products Corp.*, 141 F. 2d 687 (CCA 2, 1944). Yet, it was that case which, among others, precipitated a legislative revision of the standard to be followed by the court in enforcing orders of the Board.

B—As to whether the standard adopted by the Court of Appeals as a basis for enforcing the order to the extent it directed reinstatement is contradictory to both the statutory language and the decisions of this Court.

The Court of Appeals, in its opinion, concluded, " . . . we have carefully reviewed the whole record and on the basis of that record *we cannot say that the Board's findings are not supported by substantial evidence.*" (Italics supplied.) It is respectfully submitted that the standard set out by the Court of Appeals as the basis for granting enforcement is contrary to the statute and to the decisions of this Court.

The burden imposed upon the Court of Appeals in passing on the enforcement of a Board order is an *affirmative* one. It is the duty of the Court of Appeals, if it is to grant enforcement, to find *affirmatively*, after a review of the whole record, that the order being enforced *is* supported by substantial evidence. The Court of Appeals, in its decision, adopts a completely different standard. In effect, the Court of Appeals has not made an affirmative finding that the order is supported by substantial evidence, but, rather, has reached only the conclusion that it cannot affirmatively say that the order is not supported by substantial evidence. The second is quite different from the first.

It is apparently the holding of the Court of Appeals that if it reaches an equipoise of decision, i.e., that while

it cannot say that the order *is* supported by substantial evidence, it cannot say that it is not, that it must thereupon automatically enforce it. This is not the law. As the Senate Judiciary Committee report, which revised the standard after the *Columbia* decision (141 F. (2) 687, CCA 2, 1944), stated, "It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole record the evidence in a given instance *is* sufficiently substantial to support a finding, conclusion or other agency action as a matter of law." *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474 (1951).

In its decision in this case, the Court of Appeals, has failed to follow that mandate. It has held that if, after a review of the evidence, it cannot say that the order was not supported by substantial evidence, that that is equivalent to an affirmative holding that it was so supported. Such an equivalency is certainly bad logic. It is respectfully submitted that it is also bad law.

If a negative finding is to be sufficient to invoke the judicial sanction, it should be the decision of this Court and not of the Court of Appeals. This Court has directed that it is the duty of the Court of Appeals to determine "whether the evidence supporting the Board's order is substantial." The Court of Appeals in this case failed to make any such finding.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari, limited solely to the questions involving the propriety of the discharges, should be granted.

Respectfully submitted,

JAMES E. BIRDSALL,
Attorney for Petitioner.

APPENDIX A.

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable

grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

§ 160. Prevention of Unfair Labor Practices

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for

leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

APPENDIX B

Opinion of U. S. Court of Appeals.

OPINION

HAYS, Circuit Judge:—The National Labor Relations Board petitions for enforcement of an order based upon a finding of violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (29 U.S.C. §§ 158(a)(1) and (3)). We grant enforcement.

Respondent operated a printing plant in Poughkeepsie, New York, employing about 40 men. In the late summer of 1960 a union sought to organize the employees. During the organizing campaign respondent, through its president, Louis Perreta, his son Frank Perreta, general manager of the plant, and Peter L'Episcopo, foreman on the night shift,[1] expressed vigorous opposition to unionization, as it had a right to do. However, a number of the statements made by management representatives overstepped the limits prescribed by Section 8(c) of the Act (29 U.S.C. § 158(c)) and entered the forbidden area of coercion. Thus quite apart from the discharges which the Board found violative of both Section 8(a)(1) and Section 8(a)(3), the coercive statements of the employer constitute in themselves a violation of Section 8(a)(1). Moreover against this background of coercive statements and hostility to the union, the employer's persistent interrogation of employees as to their union membership and the union membership of fellow employees was also properly found by the Board to be violative of Section 8(a)(1).

The difficult question presented is whether the evidence supports the finding of the Board that three employees,

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[1] Respondent sought to show that L'Episcopo was not a "supervisor" within the meaning of Section 152(11) of the Act (29 U.S.C. § 152(11)). The evidence adduced by the board amply supports its findings on this score.

Cross, Pellizari and Case, were discharged for union activity in violation of Section 8(a)(3).

The crucial date in the case is September 10, 1960. On that day a meeting of the Union was held and a number of the employees attended. L'Episcopo, who was a member of the union,[2] was present at the meeting and reported on it to the Perrettas, giving the names of at least some of those in attendance. The anti-union activity of the employer followed immediately after this meeting and the three men in question who to the employer's knowledge were members of the union were discharged during the following week.

As to Cross the evidence shows that on Friday, September 9, he was asked to work overtime on September 10 and refused. However at the employer's insistence he did report for work on September 10, though he left early. He also worked on Monday, September 12 and on Tuesday, September 13. At the end of his shift on Tuesday he was discharged. According to uncontradicted testimony, which was credited by the trial examiner, a few hours before Cross was discharged Louis Perretta, pointing to Cross, said to his son, Frank:

> "There is the guy that called me up begging for a job and I hired him, and he's joined the Union, . . . That's all right, he can get a job someplace else."

Pellizari was discharged on the same day as Cross, *i.e.* the Tuesday after the union meeting of Saturday, September 10. He was ostensibly discharged for smoking in the plant, although the evidence shows that he had smoked in the plant for years and that other employees and, indeed, the representatives of management also smoked in the

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[2] In the printing trades it is customary for foremen to be members of the union.

plant. In spite of Pellizari's well-known violations of the no-smoking rule, he received a raise and commendation for his work shortly before his discharge. He testified, and his testimony was uncontradicted and was credited by the trial examiner, that during the night shift on September 10:

> "[L'Episcopo] asked me if I had joined the union, and I told him no, and he said he knew I was lying, that he knew I was in the union, that he was in the union a great number of years and it didn't help him and would not help me and in a non-union shop I would move up faster, would not have to spend time in an apprenticeship, that I would be better off not being in a union shop.
>
> Q. What happened then? A. Well, Louis Perretta was standing about three feet away on the same press and he pounded his fist on the table and said he did not want the * * * union in the shop."

Case was discharged on the Friday following the union meeting of Saturday, September 10. The ostensible reason for the discharge was an altercation between him and Louis Perretta which took place in a restaurant the afternoon preceding the discharge.[3] According to Case's uncontradicted testimony, credited by the trial examiner, L'Episcopo said to Case on September 15, the day before his discharge:

> "Louie [Perretta] knows you're in the Union, you should go up and tell him that you were in the Union, you realize it was a big mistake but you thought it was

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[3] Case had gone to the restaurant from a meeting of the union. While there is no testimony establishing that Perretta knew of Case's attendance at this union meeting, as distinguished from the meeting on the previous Saturday, it seems to us not unlikely that Perretta was informed of it.

right at the time. When you tell him, you'll be back in his good graces."

And the next day as Case was about to leave the shop after his discharge, Louis Perretta said to him:

> "The next time I meet you, kid, you better be a strong arm, • • • you were a strong arm last night, and you were a strong arm when you handed out those papers."

The remark about handing out papers clearly referred to Case's having distributed cards at the union meeting of September 10.

The issue before us is not, of course, whether or not there existed grounds for discharge of these employees apart from their union activities. The fact that the employer had ample reason for discharging them is of no moment. It was free to discharge them for any reason good or bad, so long as it did not discharge them for their union activity. And even though the discharges may have been based upon other reasons as well, if the employer was partly motivated by union activity, the discharges were violative of the Act.[4] If, for example, the employer had long contemplated discharging Pellizari for his inveterate smoking in violation of plant rules, and his joining the union was merely the final straw, the discharge must be held to be improper.

The finding of unfair labor practices with respect to these discharges rests wholly on the evidence as to the

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[4] "If employees are discharged partly because of their participation in a campaign to establish a union and partly because of some neglect or delinquency, there is nonetheless a violation of the National Labor Relations Act" National Labor Relations Board v. Jamestown Sterling Corp., 211 F. 2d 725, 726, 33 LRRM 2837 (2d Cir. 1954).

remarks of management representatives made at or about the time of the discharges. While this evidence is not as compelling as it might be it gains considerably not only in credibility, but in substantiality when it is set in the background developed by other evidence. See Paramount Cap Mfg. Co. v. National Labor Relations Board, 260 F. 2d 109, 43 LRRM 2017 (8th Cir. 1958); National Labor Relations Board v. Van Deusen, 138 F. 2d 893, 13 LRRM 603 (2d Cir. 1943). All the discharges occurred within six days of the union meeting of September 10. As we have already found there is ample evidence of hostility toward the union which was brought to a head by the reports to the employer of this meeting. For the most part the employer's coercive statements were made and its persistent interrogation took place in the few days immediately following the meeting.

The testimony as to the statements of the employer in connection with the discharges was uncontradicted. It was credited by the trial examiner who had, of course, the opportunity to observe the demeanor of the witnesses. See National Labor Relations Board v. Universal Camera Corp., 190 F. 2d 429, 27 LRRM 2373 (2d Cir. 1951). It is not so inherently unbelievable, especially in the light of the evidence as to the employer's hostility to unionization, that we can say that the trial examiner could not properly have given it credence.

The employer introduced evidence to show that sometime in late August, 1960, the principal customer of the respondent complained of the character of respondent's product and threatened to withdraw his custom. Although much was sought to be made of this warning as a basis for the discharges, it must be noted that the urgency of reform did not result in any discharges until after the lapse of more than two weeks and after the union meeting of September 10.

Appendix B.

We have discussed these discharges at rather greater length than we ordinarily would, because to our minds the evidence supporting the Board's findings is very close to the border line of the substantial evidence test. Keeping in mind, however, that it is not for us to determine how we would have decided on the evidence presented[5] we have carefully reviewed the whole record[6] and on the basis of that record we cannot say that the Board's findings are not supported by substantial evidence.

Enforcement granted.

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[5] Independent Employees Ass'n v. National Labor Relations Board, 158 F. 2d 448, 19 LRRM 2107 (2d Cir. 1946); Sperry Gyroscope Co. v. National Labor Relations Board, 129 F. 2d 922, 10 LRRM 811 (2d Cir. 1942).

[6] Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 27 LRRM 2373 (1951).

Decree.

(300)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 27470

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

GREAT EASTERN COLOR LITHOGRAPHIC CORP.,

Respondent.

Before: WATERMAN, HAYS and MARSHALL, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on October 11, 1961. The Court heard argument of respective counsel on October 19, 1962, and has considered the briefs and transcript of record filed in this cause. On November 1, 1962, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Great Eastern Color Lithographic Corp., its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

STERRY R. WATERMAN,
Judge, United States Court of
Appeals for the Second Circuit.

THURGOOD MARSHALL,
Judge, United States Court of
Appeals for the Second Circuit.

Filed: December 3, 1962.

Order of U. S. Court of Appeals Denying Petitioner's Petition for Rehearing.

(294)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of November, one thousand nine hundred and sixty-two.

Present: HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
Circuit Judges.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GREAT EASTERN COLOR LITHOGRAPHIC CORPORATION,
Respondent.

A petition for a rehearing having been filed herein by counsel for the respondent

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

(295)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

Filed November 26, 1962.

DANIEL A. FUSARO,
Clerk.

Order of Hon. Arthur J. Goldberg, Extending Petitioner's Time to File Writ.

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1962

GREAT EASTERN COLOR LITHOGRAPHIC CORP.,

Petitioner,

vs

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 25, 1963.

(s) ARTHUR J. GOLDBERG,
Associate Justice of the Supreme
Court of the United States.

Dated this 1st day
of February, 1963.

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SUPREME COURT, U. S.

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National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	
Section 8(a)(1)	2, 5
Section 8(a)(3)	6

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1030

GREAT EASTERN COLOR LITHOGRAPHIC CORP.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13-18) is reported at 309 F. 2d 352. The Board's decision and order (J.A. 3-10, 11-53)[1] are reported at 133 NLRB 911.

JURISDICTION

The opinion and judgment of the court of appeals were entered on November 1, 1962 (Pet. 13, 19),

[1] "J.A." refers to the Joint Appendix in the court below.

and a petition for rehearing was denied on November 26, 1962 (Pet. 20). On February 1, 1963, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including April 25, 1963 (Pet. 21). The petition for certiorari was filed on April 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner discriminatorily discharged three employees in violation of Section 8(a)(3) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 10-12 of the petition.

STATEMENT

A. The Board's Findings of Fact

In July 1960, the Union[1] began a drive to organize petitioner's plant. In August, Louis Perretta, petitioner's president, asked Benjamin Cross, an employee, what he knew about the Union. When Cross, who had joined the Union in July, said he knew nothing, Perretta said: "You know, you are in the Union. You know more than you tell me. What

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[1] Local 52, Amalgamated Lithographers of America.

about Pat [Case] and Marlboro Joe [Pellizzari]. Aren't they in the Union?" Cross said he did not know whether Case and Pellizzari were union members, but Perretta declared: "You must know, you attend meetings." (J.A. 12, 19; 57, 105-106).

On Saturday afternoon, September 10, the Union conducted a meeting at which Case distributed cards to fellow employees in attendance. Peter L'Episcopo, petitioner's night-shift supervisor,[1] attended the Union meeting and observed Case's distribution of the cards (J.A. 34; 59-61). At work that evening, L'Episcopo asked employee Dietz, with whom he had spoken at the meeting, whether another employee had attended the meeting. That same evening L'Episcopo spoke to several employees, including Pellizzari, about union activity at the plant (J.A. 18-19; 87-88, 151, 162, 170-171). In Louis Perretta's presence, L'Episcolo told Pellizzari, who denied being in the Union, that he knew Pellizzari was lying and that Pellizzari "would move up faster" and "would be better off not being in a union shop" (J.A. 18-19; 151). President Perretta then pounded his fist on the table and said that he did "not want the * * * union in the shop" (J.A. 33-34; 151).[2]

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[1] The Board found (J.A. 16-17) that L'Episcopo was a supervisor within the meaning of the Act, which finding was sustained by the court below (Pet. 13, n. 1).

[2] Also on September 10, Louis Perretta asked employee Filoia whether he had joined the Union and asked employee Dave Brown whether he had gone to the Union meeting (J.A. 19-20; 84-85, 161-162). On Monday, September 12, Perretta ascertained from employee Salvatore Pace that

General Manager Frank Perretta, Louis Perretta's son, discharged Pellizzari on Tuesday, September 13, allegedly for breaking petitioner's no-smoking rule (J.A. 33; 151). That same day, after lunch, Louis Perretta pointed to Cross and remarked: "There is the guy that called me up begging for a job * * * * I hired him and he's joined the Union * * * that's all right, he can get a job some place else" (J.A. 4, 19, 31; 108). At the end of the shift, Frank Perretta told Cross that his father was tired of looking at him and discharged him (J.A. 30; 109).

Although Pellizzari had smoked in the plant for many years, so had other employees, including the representatives of management. Moreover, Pellizzari had been complimented on his work during the summer of 1960 and told that he was getting a seven dollar raise. (J.A. 32, 33; 148-149, 67-68, 109, 150, 460, 165, 171-172). Similarly, although Cross had come to work with a "hangover" on September 13 and had a history of taking days off and coming in late, he was permitted to work the entire shift on the thirteenth and was not discharged until after Louis Perretta had referred to his union membership (J.A. 30-32; 107, 118-120).

On September 15, Supervisor L'Episcopo told Patrick Case, "Louis knows you're in the Union, you

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Pace had joined the Union. A few days later, Perretta asked Pace to name any employee "who was enrolled in the Union" and particularly to tell him "who the organizer was" (J.A. 20; 174). Late in September, Perretta asked employee Critelli whether Cross had tried "to get [him] into the Union" (J.A. 20; 145-146).

should go up and tell him that you were in the Union, you realize it was a big mistake but you thought it was right at the time. When you tell him, you'll be back in his good graces." (J.A. 19; 61.) Case ignored this advice and the next day Louis Perretta said to him, "We don't want you around here, we don't need you around here anymore." Case collected his tools and, as he was leaving the plant, Perretta called after him "The next time I meet you, kid, you better be a strong-arm * * * You were a strong-arm last night and you were a strong-arm when you handed out those papers" (J.A. 35; 63). The night before Case had had an altercation with Louis Perretta in a restaurant (J.A. 35; 62-63). The references in Perretta's remarks were to this quarrel and to Case's distribution of membership cards at the Union meeting on September 10 (J.A. 36).

Petitioner discharged 13 employees between September 13 and 28, 1960. Ten of the discharged employees were union members (J.A. 57-58, 204, 253, 269). When asked late in September why so many union members had been discharged, General Manager Frank Perretta told a group of employees: "Yeah, yeah, they are in the Union. Why? Do I have to fire you too? Are you in the Union?" (J.A. 21; 207).

B. The Board's Conclusions and Order

The Board found that petitioner violated Section 8(a)(1) of the Act by threatening the employees with job loss for having joined the Union, by promising them benefits if they abandoned it, and by co-

cively interrogating employees concerning their union membership and activities (J.A. 18-22). The Board further found that, while good cause existed for the discharges of Cross, Pellizzari and Case, the discharges were not motivated by this consideration but by the employees' union activity, and thus violated Section 8(a)(3) (J.A. 4-5, 30-37).

The Board's order (J.A. 6-8) requires petitioner to cease and desist from the unfair labor practices found, and from in any other manner infringing its employees' rights under the Act. The order also requires petitioner to reinstate Cross, Pellizzari and Case with back pay, and to post an appropriate notice.

C. The Decision of the Court of Appeals

The court of appeals concluded that the Board's findings were supported by substantial evidence and enforced the Board's order in full (Pet. 13-18).

ARGUMENT

The sole question presented is whether the Board's findings that petitioner discharged employees Cross, Pellizzari and Case because of their union activity rather than because of their employment deficiencies, is supported by substantial evidence on the record as a whole. The court of appeals, after a careful analysis of the record (Pet. 13-18), concluded

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The Board's complaint had charged that petitioner had illegally discharged eight employees (J.A. 12), and the trial examiner had held that four of them had been discharged for their union activities (J.A. 22-46).

that the Board's findings were so supported. The correctness of this factual determination presents no issue warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

The court of appeals applied the proper standard of review. It is not the function of the reviewing court to reweigh the evidence or to "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. at 488. The court's function is simply to determine whether the credibility determinations made and the inferences drawn by the Board are reasonable, "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Ibid.* See also, *National Labor Relations Board* v. *Walton Manufacturing Company*, 369 U.S. 404, 405. The court below, in stating its conclusion regarding the substantiality of the evidence negatively rather than affirmatively,* was not, as petitioner suggests (Pet. 8-9), abdicating its reviewing function, but was merely emphasizing that its task was not to reweigh the evidence *de novo*. For, although the court did not reweigh the evidence, a reading of its entire opinion shows that it meticulously examined the record and

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* The court stated (Pet. 18): "we have carefully reviewed the whole record and on the basis of that record we cannot say that the Board's findings *are not* supported by substantial evidence" (emphasis added).

satisfied itself that there was rational support for the Board's findings. Similarly, the failure of the court to allude to the evidence relied on by petitioner does not mean (Pet. 4-8) that it was overlooked, but only that the court concluded that the Board was warranted in finding that it was outweighed by the other evidence in the record.[7]

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[7] The two excerpts from Case's testimony on cross-examination relied on by petitioner (Pet. 5) are not so unequivocal as to constitute a retraction of his testimony on direct examination which the Board credited (cf. J.A. 63 with J.A. 75, 79). The fact that Cross, in his pre-trial affidavits, did not mention everything that he later testified to at the Board hearing (Pet. 6), was evaluated by the Examiner and found not to affect his credibility (J.A. 31-32). Finally, there is nothing in the Board order which immunizes Pellizzari against discharge for smoking (Pet. 7). The Board found, and the court below agreed, that Pellizzari was not discharged because of his smoking, but because of his union activity, and the Board's order merely prohibits a discharge for the latter reason.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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